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Kavitha a/p Krishnan & Anor v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCvC-154–07 OF 2012
YEOH WEE SIAM J
7 JANUARY 2013

Civil Procedure — Striking out — Writ and statement of claim — Plaintiffs diagnosed with HIV positive after blood transfusion by public officer — Tort action against government — Public officer responsible for alleged medical negligence not named in writ of summons and statement of claim — Rules of Court 2012 O 18 r 19 — Whether failure to name public officer fatal and defective

Limitation — Public authorities — Tort — Plaintiffs diagnosed with HIV positive after blood transfusion by public officer — Action against government 36 months from date of giving blood transfusion — Whether action time-barred — Public Authorities Protection Act 1948 s 2(a)

Tort — Negligence — Medical negligence — Plaintiffs diagnosed with HIV positive after blood transfusion by public officer — Tort action against government — Whether government could be sued — Government Proceedings Act 1956

The plaintiffs were diagnosed with HIV positive as a result of blood transfusion administered by the public officer of the defendant. The plaintiffs then filed an action against the defendant 36 months from the date of giving blood transfusion by the public officer. In the action, the plaintiffs' writ of summons and statement of claim were fatally flawed and rendered defective as the said pleadings failed to name or join the public officer who was responsible for an alleged medical negligence or default. The court allowed the defendant's application to strike out ('encl 7') the plaintiffs' claim under O 18 r 19 of the Rules of Court 2012 ('ROC') on the grounds that it disclosed no reasonable cause of action against the defendant and was otherwise an abuse of court process. This was an appeal against striking out of encl 7. The defendant contended that the plaintiffs should commence the proceedings within 36 months from the act complained as required by the first limb of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA').

Held, allowing the appeal:

(1) From s 5 of the Government Proceedings Act 1956 ('the Act'), the defendant would only be vicariously liable for any wrongful act done or

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any neglect or default committed by of any public officer to the same extent as that of a principal for his agent. Under s 6(1) of the Act, the defendant could not be sued by virtue of s 5 unless such proceedings for damages would have lain or could be commenced against such public officer personally. Applying ss 5 and 6(1) of the Act, the plaintiffs could only file proceedings against the defendant if the public officer, who could be personally liable for the alleged tort, was named as a defendant in the action (see paras 5–7).

(2) The facts of this case fell within the first limb of s 2(a) of the PAPA. This case was governed by the second limb of s 2(a) of the PAPA. This was a case where there was 'a continuance of injury of damage'. Therefore, the limitation period to file the action would be 36 months after the ceasing of the continuance of injury or damage caused by the act, neglect or default complained of. The court gave the benefit of the doubt to the plaintiffs. Therefore, the plaintiffs' claim was not time-barred under the second limb of s 2(a) of the PAPA (see paras 13–14).

[Bahasa Malaysia summary

Plaintif-plaintif diagnosis dengan positif HIV akibat transfusi darah yang dilakukan oleh pegawai awam defendan. Plaintif-plaintif kemudiannya memfailkan tindakan terhadap defendan 36 bulan dari tarikh diberikan transfusi darah oleh pegawai awam. Dalam tindakan tersebut, writ saman dan pernyataan tuntutan plaintif-plaintif adalah cacat dan dikatakan cacat kerana pliding tersebut gagal untuk menamakan atau menghubungkan pegawai awam yang bertanggungjawab untuk kecuaian perubatan yang didakwa tersebut atau kegagalan. Mahkamah membenarkan permohonan defendan untuk membatalkan ('lampiran 7') tuntutan plaintif-plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa ia tidak mendedahkan kausa tindakan yang munasabah terhadap defendan dan oleh itu penyalahgunaan proses mahkamah. Ini adalah rayuan terhadap pembatalan lampiran 7. Defendan berhujah bahawa plaintif-plaintif patut memulakan prosiding dalam masa 36 bulan dari tindakan diadukan seperti yang dikehendaki oleh bahagian pertama s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA').

Diputuskan, membenarkan rayuan:

(1) Daripada s 5 akta Prosiding Kerajaan 1956 ('Akta'), defendan hanya bertanggungan vikarius untuk apa-apa kesalahan yang dibuat atau apa-apa kecuaian yang dilakukan oleh pegawai awam sehingga sama seperti prinsipal untuk ejennya. Di bawah s 6(1) Akta, defendan tidak boleh disaman mengikut s 5 kecuali prosiding sedemikian untuk ganti rugi terletak ke atas atau boleh dimulakan terhadap pegawai awam tersebut secara peribadi. Mengguna pakai ss 5 dan 6(1) Akta, plaintif-plaintif hanya boleh memfailkan prosiding terhadap defendan

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jika pegawai awam tersebut, yang boleh bertanggungan secara peribadi untuk tort yang didakwa tersebut, dinamakan sebagai defendan di dalam tindakan (lihat perenggan 5–7).

(2) Fakta dalam kes ini terangkum di dalam bahagian pertama s 2(a) PAPA. Kes ini ditadbir oleh bahagian kedua s 2(a) PAPA. Ini adalah kes di mana terdapat 'a continuance of injury of damage'. Oleh itu, tempoh had masa untuk memfailkan tindakan adalah 36 bulan selepas terhenti penerusan kecederaan akibat tindakan, kecuaian atau kegagalan yang diadukan tersebut. Mahkamah memberi manfaat keraguan kepada plaintif-plaintif. Oleh itu, tuntutan plaintif-plaintif tidak dihalang oleh had masa di bawah bahagian kedua s 2(a) PAPA (lihat perenggan 13–14).]

Notes

For cases on medical negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1416–1423.

For cases on writ and statement of claim, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8594–8605.

Cases referred to

Government of the State of Sabah v Svarikat Raspand (suing as a firm) [2010] 5 MLJ 717; [2010] 7 CLJ 945, CA (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Ronald Beadle v Hamzah HM Saman & Ors [2007] 2 MLJ 201, CA (refd)

Legislation referred to

Government Proceedings Act 1956 ss 5, 6, 6(1)
Public Authorities Protection Act 1948 s 2(a)
Rules of Court 2012 O 18 r 19(1)(a), (b), (d)

Vanessa Wong (Mah-Kamariyah & Philip Koh) for the plaintiffs.
Zetty Zurina (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Yeoh Wee Siam J:

JUDGMENT (IN RESPECT OF ENCL 7)

[1] This is an appeal by the plaintiffs against my decision on encl 7 given on 21 November 2012.

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ENCLOSURE 7

[2] This is the defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(b) or (d)] of the Rules of Court 2012 ('the ROC').

THE COURT'S DECISION REGARDING ENCL 7

[3] The defendant's application is allowed. Costs of RM1,000 are to be paid by the plaintiffs to the defendant.

GROUNDS FOR THE COURT'S DECISION

[4] The main ground for allowing the application is because the plaintiffs did not name or join the public officer liable for the alleged medical negligence or default. This is required by ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA') ('Act 359').

Sections 5 and 6(1) of the GPA provide:

> Liability of the Government in tort
>
> 5 Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> Limits of liability of the Government
>
> 6(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[5] From s 5 of the GPA it is clear that the Government of Malaysia is only vicariously liable for any wrongful act done or any neglect or default committed by of any public officer to the same extent as that of a principal for his agent.

[6] Under s 6(1) of the GPA, the Government of Malaysia cannot be sued by virtue of s 5 unless such proceedings for damages would have lain or can be commenced against such public officer personally.

[7] Applying ss 5 and 6(1)of theGPA of the GPA, the plaintiffs can only file

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proceedings against the Government of Malaysia if the public officer, who can be personally liable for the alleged tort, is named as a defendant in the action.

In *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, the Federal Court stated:

> Therefore, on a proper construction of s 5 and s 6 of Act 359 and, in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability must be established before the government can be made liable vicariously as principal. It would be insufficient to merely indentify the officer as a party because liability by evidence needed to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government.

(see also Court of Appeal case, *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717; [2010] 7 CLJ 945)

[8] The plaintiffs' writ of summons and statement of claim are fatally flawed and rendered defective in view of the failure to name the public officer who is responsible for the alleged medical negligence as a defendant in this action. For this reason, I allowed the defendant's application to strike out the plaintiffs claim under O 18 r 19(1)(a) of the ROC on the ground that it discloses no reasonable cause of action against the defendant, and under O 18 r 19(1)(d) of the ROC on the ground that it is otherwise an abuse of the process of the court. This is a plain and obvious case for striking out the plaintiffs' claim. There is no necessity for the action to go for full trial.

[9] Counsel for the defendant submitted that this action is time-barred under the first limb of s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA').

Section 2(a) of the (the PAPA) provides:

> Protection of persons acting in execution of statutory or other public duty
>
> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceedings is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceedings shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

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[10] The defendant's contention is that the plaintiffs should commence proceedings within 36 months from the act complained of ie the act, neglect or default, as required by the first limb of s 2(a) of the the PAPA. However, the plaintiffs filed the action on 6 July 2012 which is beyond the 36 months from the date of the one act of giving the blood transfusion on 5 April 2001 by the public officer, which 36 months would expire on 4 April 2001. Counsel for the defendant submitted that this is not a case of several continuing acts of giving the blood transfusion. Therefore, the second limb of s 2(a) of the PAPA should not apply.

[11] In *Ronald Beadle v Hamzah HM Saman & Ors* [2007] 2 MLJ 201 the Court of Appeal at p 209, regarding s 2(a) of the the PAPA, stated:

> [18] This section was also succinctly explained by Wan Sulaiman J (as he then was) in the case of *Mak Koon & Anor v Municipal Councillors, Malacca* [1967] 1 MLJ 256. After referring to the English Court of Appeal case of *Carey v Metropolitan Borough of Bermondsey* 20 TLR, the learned judge said this at p 259:
>
> Court of Appeal held in respect of that section of the English Act which is in pari materia with our s 2(a) that 'the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage'. Time would therefore begin to run for the purposes of the Ordinance, from the time the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damages, when the act causing the injury or damage ceased.

[12] In my view, the plaintiffs' claim is time-barred if one interprets the phrase 'continuance of injury or damage' to be confined to the act complained of ie the blood transfusion which caused the plaintiffs to suffer from the HIV.

[13] However, I do not think that the facts of this case fall within the first limb of s 2(a) of the the PAPA. I am of the opinion that this case is governed by the second limb of s 2(a) of the the PAPA. This is a case where there is 'a continuance of injury of damage'. Therefore, the limitation period to file the action would be 36 months after the ceasing of the continuance of injury or damage caused by the act, neglect or default complained of. The plaintiffs are still continuing to suffer from the symptoms of the HIV or the injury or damage caused by the blood transfusion administered by the public officer of the defendant. Both plaintiffs are now still HIV positive. Therefore, the injury or damage suffered by both plaintiffs have not ceased, which means the limitation period of 36 months after the cessation of the wrongful act, neglect or default has not even started to run yet.

[14] It is arguable whether this case falls within the first or second limb of s 2(a) of the the PAPA. Here, I would like to give the benefit of the doubt to the

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plaintiffs and hold that the plaintiffs' claim is not time-barred under the second limb of s 2(a) of the PAPA.

Appeal allowed.

Reported by Afiq Mohamad Noor